Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

MANUEL GUERRA GAMBOA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Does a criminal defendant have to make an affirmative showing of no predisposition to utilize an entrapment defense?

2. Do the guidelines permit an assessment of drug quantity based on a single precursor chemical?

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Petitioner, Manuel Guerra Gamboa through counsel respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on the 11th day of April 1994.

OPINION BELOW

On April 11, 1994, the Court of Appeal entered its Opinion affirming Petitioner's convictions for six counts of violation of conspiracy to manufacture and distribute methamphetamine (Count I) 21 U.S.C. §841(a)(1), distributing methamphetamine (Counts II-IV) (21 U.S.C. §841(a)(1), and 18 U.S.C. §2) and possessing methamphetamine with the intent to distribute (Count V) 21 U.S.C. §841(a)(1) and 18 U.S.C. §2 (E.C.R. 1-7)

Title 21 U.S.C. §841(a)(1) provides:

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

JURISDICTION

On April 11, 1994, the Court of Appeals entered its Opinion affirming Petitioner's convictions. (Appendix "A") Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari after decision by the United States Court of Appeals, Ninth Circuit, rendered on April 11, 1994, affirming Petitioner's convictions.

A six count Indictment was filed on or about September 2, 1992, charging Petitioner and others with conspiracy to manufacture and distribute methamphetamine (Count I) 21 U.S.C. §841(a)(1), distributing methamphetamine (Counts 2-4) (21 U.S.C. §841(a)(1) and 18 U.S.C. §2) and possessing with the intent to distribute methamphetamine. (Count 5) (21 U.S.C. §841(a)(1) and 18 U.S.C. §2) (E.C.R. 1-7)

On December 9-15, 1992, jury trial was held before the Honorable Leland C. Nielson, as to Petitioner Gamboa; Petitioner was found guilty on all counts. (E.C.R. 128)

On March 8, 1993, Petitioner was sentenced to 360 months as to each count, to run concurrently. (E.C.R. 100-114, 116)

A Notice of Appeal was filed on March 16, 1993. (E.C.R. 115)

STATEMENT OF FACTS

Stated quite tersely for the purposes of this Petition, the facts are as follows:

In February, 1992, an informant named Joe Lyons, was arrested in Escondido, California, by agents of a

drug task force, for selling five pounds of methamphetamine to an informant. (R.T. 8, 114) Lyons pled guilty to the offense, and agreed to cooperate with the government, by testifying, and by acting as a confidential informant. (R.T. 9-10, 115-117, 146-147)

He was awaiting sentencing, facing a possible life sentence on two felony charges at the time of his testimony. (R.T. 10, 115) He had been convicted of possession of a quarter pound of marijuana in 1986, and in 1987, was convicted of possession of 4-5 grams of methamphetamine. (R.T. 11) Prior to his arrest, Lyons used approximately 1/16 of methamphetamine per week. After his arrest, he was tested six times per month, and had one dirty test in June 1992 between his arrest in February and the time of his testimony in this matter. (R.T. 12-13, 160)

From 1989 to the time of his arrest, Lyons ran his own methamphetamine distributing organization, and sold between five and twenty pounds of methamphetamine per month. (R.T. 11-12, 16, 123) He maintained a residence in which one of his associates, David Casellianos reworked or cut the methamphetamine that Lyons' organization sold, but it was his testimony that his organization did not manufacture its own methamphetamine, and that Appellant Gamboa and his associate Mr. Rios were the main suppliers of his organization. (R.T. 14, 16, 124, 127, 137-138)

Lyons asserted that he met Gamboa and Rios in June or July of 1989 in San Marcos, where Lyons gave them hydrogen chloride gas for a half of a pound of methamphetamine. (R.T. 15) Lyons and Gamboa then became friends. (R.T. 131) Before and after Lyons' arrest, they saw

each other two or three times per week. Lyons was aware that Gamboa worked in a nursery. (R.T. 132, 206) Lyons stated that Gamboa indicated that he manufactured the methamphetamine that he sold, and Lyons frequently fulfilled Gamboa's requests for the chemicals used in manufacturing it. (R.T. 17-18) For the first year that Lyons dealt with Gamboa and Rios, they delivered methamphetamine to Lyons themselves. After that, they employed a driver, Hilario Hernandez, who delivered it. (R.T. 17, 183)

When Lyons began working as a confidential informant in March 1992, he was under the guidance of Narcotics Agent Dean Spinos. His initial role was to contact several people to see if he could set up a methamphetamine sale. (R.T. 117, 130, 158-59) Lyons was not told that a transaction of any specific magnitude would be necessary before he received benefits in his own case, but he felt that any transactions he might set up would have to be fairly substantial. (R.T. 122) Between March 1992 and April 1992, Lyons did not complete any transactions. (R.T. 120, 167-68) In terms of the undercover investigation which led to the arrests of Gamboa, Rios, Loera, and Hernandez, it was Lyons' testimony that a trade, rather than a straight sale was the consistent goal. (R.T. 22-23, 118-121) Shortly after his arrest, Lyons and Gamboa were in frequent contact to discuss the possibility of Gamboa's trading methamphetamine and cash for ephedrine. (R.T. 23-4, 159, 173, 202-3) Lyons informed Gamboa of his arrest, and indicated that many of his assets had been seized, and that he needed to set up a transaction in order to recoup some of his losses. (R.T. 134-6) He told Gamboa that he had "Chinese white" for

sale; "China white" being a street name for ephedrine, according to Lyons. (R.T. 140-41, 153) At no time did Gamboa tell Lyons that he did not want to purchase the ephedrine from him. (R.T. 113) Lyons did speak to other individuals about a straight sale of methamphetamine, but never with Gamboa. (R.T. 120-21, 136) During the time of the Gamboa investigation, Lyons was not working on any other transactions. (R.T. 133) Lyons made notes during the investigation and periodically showed them to Spinos. He also used them during his testimony. (R.T. 63, 166, 202)

On March 23, 1992, Gamboa and Rios showed up at Lyons' house in San Marcos unannounced. Gamboa then insisted upon giving Lyons a four gram sample of methamphetamine (Government's #1) of which Gamboa said ten pounds were currently available, and 40 more would soon be available. (R.T. 24-25, 162-63, 165, 175-77, 205) When they left, Lyons immediately called Spinos and informed him of his meeting with Gamboa and the sample. He later met with Spinos and turned the sample over to him. (R.T. 25, 163, 202) He told Spinos that Gamboa had methamphetamine available for straight sale, but Spinos was not interested. (R.T. 175) There was no recording or surveillance of the March 23, 1992 meeting. (R.T. 174, 177)

There followed a series of video-taped meetings involving Gamboa and Rios, and the informant, to negotiate the trade of methamphetamine for ephedrine, including a trade of ten pounds of ephedrine for two pounds of methamphetamine on May 29, 1992. (R.T. 44-45, 183-184, 205-206, 186, 48, 49-50)

Numerous discussions followed, in which Lyons was offering fifteen kegs of ephedrine (55 pounds each) in return for twenty pounds of methamphetamine and $200,000.00. (R.T. 73-74, 187, 207) Petitioner attempted to arrange lesser amounts, but the controlling Agent, Spinos, would not authorize it, and insisted on a larger transaction. (R.T. 74-78, 187)

Ultimately, an arrangement was concluded, which involved a trade of 5 kegs of ephedrine for twenty pounds of methamphetamine, and $60,000.00. (R.T. 83-86) This transaction was accomplished on August 24, 1992, and was followed by arrests. Petitioner and his cohorts had only provided $16,000.00, and the methamphetamine.

Although informant Lyons was the only person who testified that Petitioner had a prior history of drug dealing, and although Lyons was significantly impeached on many aspects of his testimony, the trial court refused instructions on entrapment, on the grounds that there was no evidence of non-predisposition. Petitioner objected, and moved for mistrial. (R.T. 472-476) A later motion for a new trial on this ground was denied. (R.T. 2; E.C.R. 50-57,100)

Petitioner was sentenced to 360 months, based on the assumption that the ephedrine that was received could have been converted to methamphetamine, instead of based on the number of pounds of ephedrine actually recovered. (R.T. 14; E.C.R. 115)

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT ON THE DEFENSE OF ENTRAPMENT

This case presents a critical issue relating to the defense of entrapment. Posed is the question of whether or not a defendent in a criminal offense must present affirmative evidence regarding his lack of predisposition to commit an offense, or whether it is sufficient for him to demonstrate, through cross-examination, that the Government's only evidence on the subject is unreliable.

Petitioner's *only* defense at trial was that of entrapment, and Petitioner submitted several versions of an entrapment instruction (see, Excerpts of Record, pp. 8-14), and argued extensively that an entrapment instruction be given. Petitioner expressly objected to its not being given, arguing that such decision denied him the right to a jury trial on a critical aspect of the case, and denied him due process. Petitioner also moved for a mistrial on those grounds. (R.T. 12/15/92: 469-476)

In this context, it is generally held that a defense of entrapment is established if the defendant was induced to commit the crime by a Government agent, and the defendant was not otherwise predisposed to commit the crime. *United States v. Kessee*, 992 F.2d at 1001 (9th Cir. 1993). The Court therein stated, *Id.* at 1003:

> A defense of entrapment is established if the defendant was (1) induced to commit the crime by a government agent and (2) not otherwise predisposed to commit the crime. **United States v. Smith**, 924 F.2d 889, 898 (9th Cir. 1991). "A defendant must present evidence on both

> elements of the defense, but only '**slight** evidence is needed to create a factual issue and get the defense to the jury.' " **United States v. Sotelo-Murillo**, 887 F.2d 176, 179 (9th Cir. 1989) (citations omitted). " '[T]he evidence may be weak, insufficient, inconsistent, or of doubtful credibility,' " **Id.** at 178 (citation omitted), but the defendant is entitled to an instruction unless the prosecution rebuts the evidence such that "no rational jury could entertain a reasonable doubt as to either element." **United States v. Hoyt**, 879 F.2d 505, 509, **amended on other grounds**, 888 F.2d 1257 (9th Cir. 1989).

Three obviously determinative issues control the current appeal: first, who has the burden of proof on the issues of entrapment; second, who has the burden of coming forward with evidence on the subject; and, third, what quantum of proof is required.

It is initially to be observed that it is beyond dispute that the government bears the ultimate burden of proof of showing that the defendant was *not* entrapped, and must establish beyond a reasonable doubt either that the defendant was not induced by a government agent, or was predisposed to commit the offense. *United States v. Barry*, 814 F.2d 1400, 1402 (9th Cir. 1987); *United States v. Dearmore*, 672 F.2d 738, 740 (9th Cir. 1982); *Jacobsen v. United States*, 503 U.S. ___, 118 L.Ed.2d 174, 185, 112 S.Ct. (1993). As noted in *Jacobsen, Id.*, 118 L.Ed.2d at 184:

> In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. Sorrells, supra, at

> 442, 77 L Ed 413, 53 S.Ct. 210, 86 ALR 249; Sherman, supra, at 372, 2 L Ed 2d 848, 78 S Ct. 819. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents. United States v. Whoie, 288 US App DC 261, 263-264, 925 F.2d 1481, 1483-1484 (1991).

(fn. omitted)

The question of who, if anyone, has the burden of coming forward on the issues of entrapment, presents a more delicate issue; and it is an issue which bears constitutional overtones. Certainly it cannot be the rule that a defendant must testify in order to establish the defense; such a rule would violate the defendant's Fifth Amendment privileges not to testify, to remain silent, and against self-incrimination. And, indeed, such is not the rule. In the case of *United States v. Demma*, 523 F.2d 981, 984 (9th Cir. 1975), the Court held the entrapment defense applicable to a situation in which a defendant does not testify or otherwise comment on the crime, so long as the issue is presented by the evidence, either in the Government's case-in-chief, or where a " . . . defense or Government witness gives evidence suggesting entrapment." (fn. omitted)

Decisions before and after *Demma* have addressed the question of when entrapment instructions are required in relation to a defendant who has presented no affirmative evidence on the subject. Some have held that it is proper to refuse the instruction, but only in those situations

where the result is that there is no evidence of the government inducement. As described in the case of *United States v. Christopher*, 488 F.2d 849, 850-851 (9th Cir. 1973):

> The **lone** fact that the government's agent, posing as a buyer, initially contacted the appellants is evidence only that the Government furnished the opportunity for the commission of a crime. The slight testimony which we have held allows the issue of entrapment to go to the jury must still constitute some evidence of inducement or persuasion by the Government. Since we find there was no evidence of entrapment in this case, we need not reach the Government's alternative grounds to deny the entrapment instruction.

(fn. omitted)

Other cases have emphasized that where there was neither evidence of persuasion, inducement, and where predisposition appeared irrefutable, no instruction was required. (see, e.g., *United States v. Glaeser*, 550 F.2d 483, 487 (9th Cir. 1977); *United States v. Brandon*, 633 F.2d 773, 778-779 (9th Cir. 1980); *United States v. Payseur*, 501 F.2d 966, 971 (9th Cir. 1974).)

Yet, the concepts of inducement and predisposition are closely related; in *Payseur*, the court stated that an instruction on the issue is required whenever the evidence tends to show that the crime may have been induced by a Government agent. (*Id.* 501 F.2d at 971.)

Still other cases appear to demand an affirmative showing by the defense of non-predisposition. In *United States v. Rhodes*, 713 F.2d 463 (9th Cir. 1986), the Court

suggested that, where the *defense* has not presented evidence of inducement and lack of predisposition, no instruction is warranted. *Rhodes* was followed in *United States v. Hoyt*, 879 F.2d 505, 509 (9th Cir. 1989), in which the Court suggested that the defense must present evidence to show *both* inducement and a lack of predisposition in order to be entitled to entrapment instructions.

However, the decisions in *Rhodes* and *Hoyt*, it is respectfully submitted, tend to ignore the central issue in favor of a compartmentalized view of the entrapment defense. The fundamental issue, as is the case with any requested instruction, is that of whether of not there is any "slight" evidence, however weak or inconsistent, insufficient, or incredible, to support the notion that the defendant was entrapped. *United States v. Kessee, supra.* It is a jury function to determine every material aspect of a criminal case (*Sandstrom v. Montana*, 443 U.S. 510 [61 L.Ed.2d 39, 99 S.Ct. 2450, 61 L.Ed.2d 39] (1979)), element of offense (*United States v. Johnson*, 718 F.2d 1317, 1322-1323, decision as to whether document constituted a security; *United States v. Goetz*, 746 F.2d 705, 708-709 (11th Cir. 1984), issue of whether or not document constituted a tax return), and such issues cannot be decided by the Court.

Most significantly, issues such as entrapment do not deserve or require some "special treatment" apart from other jury issues, as to when the issue will be submitted to the jury. Whenever the evidence, circumstances, or inferences supply a basis upon which to argue an entrapment, the instruction should be given, regardless of who has presented the evidence. It is interesting to note that entrapment cases often turn on the circumstances of the

offense itself, and the issue becomes one of what inferences a jury will make from those facts. This was certainly true in the case of *Jacobsen v. United States, supra,* in which the defendant had long had an interest in certain kinds of pornography, but previously such had not been the charged crime, and the Government's inducements to give him a predisposition to commit the offense were part of the problem. The Court held entrapment was shown as a matter of law, despite the defendant's ready response to solicitation. (*Id.*, 503 U.S. ___, 118 L.Ed.2d at 187) In so holding the Court focused on the overall circumstances as to how the crime came to pass.

In *United States v. Sotelo-Murillo,* 887 F.2d 176, 179 (9th Cir. 1989) the Court again focused largely on the circumstances attending the offense, to hold that it was error to deny the instructions. To a lesser or greater extent, and despite language to the contrary, virtually all of the decisions cited above (e.g. *United States v. Hoyt, supra; United States v. Rhodes, supra; United States v. Busby, supra*), focused on the overall circumstances.

It should also be emphasized that this issue is one on which the Government bears the burden of proof beyond a reasonable doubt; where there is evidence of inducement, the Government must either disprove inducement, or prove predisposition. It is for the jury to determine which inferences are the most persuasive.

Thus, the procedural aspects of the presentation of this defense are properly explained in the case of *United States v. Barry,* 814 F.2d 1400, 1401-1402 (9th Cir. 1987) The defense does *not* bear the burden of coming forward with evidence. The Court therein stated, *Id.*, 1401-1402:

Appellant erroneously suggests that under **Busby** he carries the burden of proving his entrapment. Language used in some cases has suggested that, to be entitled to an entrapment instruction, a defendant may bear a burden to come forward with evidence. **See e.g., United States v. Rhodes**, 713 F.2d at 467. But it is clear in this circuit that the trial judge must give the instruction if there is some evidence of government inducement, regardless of who produced that evidence. In **United States v. Demma**, 523 F.2d 981 (9th Cir. 1975) (en banc) we overruled the **Eastman** rule, **Eastman v. United States**, 212 F.2d 320 (9th Cir. 1954), requiring a defendant to admit the crime charged in order to claim entrapment. We there explained the operation of the entrapment defense as follows:

> If a defendant declines to testify at trial and otherwise refuses to comment on the crime charged, then he has not denied the crime. Entrapment may nonetheless become an issue at his trial if (1) the Government's case-in-chief suggests that the defendant who was not predisposed was induced to commit the crime charged, or (2) a defense or a government witness gives evidence suggesting entrapment . . .
>
> At the close of a case in such a posture, defense counsel may and, indeed, he should argue to the jury that (1) the Government has not proved beyond a reasonable doubt that the defendant committed the crime charged, and (2) if the Government has so proved, then the government has not

> proved beyond a reasonable doubt that the acts charged were nonentrapped.

(fns. omitted)

Viewing the present case in a light most favorable to Petitioner *United States v. Billue*, 994 F.2d 1563, 1567 (11th Cir. 1993), there was evidence that the informant had met Petitioner in June or July of 1989, and they had become friends. (R.T. 12/9 and 10/93: 15, 131) They saw each other two to three times per week. (R.T. 12/9 and 10/93: 132, 206) The informant Lyons, had been arrested in February, 1992, and began his work as an informant in March. (R.T. 117, 130, 158-159) He knew he had to set up large transactions in order to receive benefits on his own case. (R.T. 122) While Lyons got out of jail in February, and spoke to Gamboa within three days thereof (R.T. 135), he made no transactions until late April. It was also established that he and Gamboa were not only friends, but had done favors for each other over the years. Lyons explained to Gamboa that because of Lyon's recent arrest, and loss of assets from forfeiture, he was in serious and dire need to generate income, so that he could pay his lawyer and to replace his assets. (R.T. 135-136)

It was Lyons who first contacted Gamboa. (R.T. 135) Contrary to portions of Lyon's testimony, there was evidence that he at first tried to secure 6 to 8 pounds of methamphetamine from Gamboa, but Spinos was not interested. (R.T. 175) Spinos' testimony did not bear this out. (R.T. 152)

There was also evidence that Lyons then explained to Gamboa that he had a cousin with a lot of ephedrine, who had his own legal difficulties and needed to sell it. Lyons

explained to Gamboa that ephedrine was valuable, and could be sold, but that Lyons, because of his recent arrest, could not do it himself. (R.T. 152-154) Lyons testified that this discussion was the genesis of the present charged transactions. (R.T. 153) There was evidence from which it could be inferred that Petitioner was taking the ephedrine to someone else for approval which would suggest that he was "brokering" the ephedrine as Lyons had explained to Petitioner. (R.T. 154-158)

A jury could well have considered the foregoing evidence to conclude that Gamboa had been induced by appeals to friendship, sympathy, and to return prior favors. (See and compare, *United States v. Kessee, supra; United States v. Sotelo-Murillo, supra*), and by putting in Petitioner's mind a lucrative process.

There was evidence of a prior illicit relationship between Lyons and Gamboa, involving drug deals. But this evidence came entirely from Lyons. Appellant sought to refute this evidence by impeaching Lyons. This was fruitful. Lyons was a convicted felon; he was under the threat of a possible life sentence from his pending case. His only then pending deal was the one into which he had induced his friend; he had frequent contact with Gamboa after his own arrest, but nothing came to fruition until April. (R.T. 14, 16, 124, 127, 137-138; 120, 167-168.)

Lyons' early meetings, in March, with Gamboa were unsupervised and unrecorded. (R.T. 174, 177) Lyons claimed that Gamboa had offered him ten to forty pounds of finished product (this, too, was unrecorded) in March, but Gamboa never did so. He claimed that Gamboa had been his supplier for years, but only Lyons' word existed

to prove that fact; and on cross-examination, evidence was established from which the jury could infer that Lyons had his own "cook" and organization. (R.T. 123-129, 137-139, 354-355)

It also appeared that Lyons had not been accurate in his testimony that a trade was the plan from the beginning. In fact there was a report that he had tried to buy large amounts of amphetamine from Gamboa, as a straight purchase, but did not. (R.T. 357, 446-447) Lyons was also a drug abuser, and despite instructions to the contrary, there was evidence that he had used drugs during the period he was an informant. (R.T. 434-435) It had taken seven to eight weeks from Mr. Lyons' arrest to get to the point where a transaction was likely. (R.T. 449) And that involved a trade, which Gamboa repeatedly tried to "downsize" (R.T. 453), to arrange it so he could get the ephedrine first (R.T. 187) and was ultimately unable even to pay "full fare" for the lesser amount. (R.T. 196)

And there was evidence that Gamboa worked at a nursery. (R.T. 132)

From all of the foregoing, a reasonable jury could have determined not to believe Lyons' testimony that Gamboa had been his supplier for years; and not to believe that Gamboa was predisposed to commit the offense. The jury could have decided that there was at least a reasonable doubt as to whether or not Lyons, an unreliable drug trafficker and convicted felon, under the enormous pressure of his own problems, decided not to inform on the members of his own ring, but to contact Gamboa (who was a nursery worker) and to convince

him to become involved in the charged transactions out of sympathy for the dire straights in which he found his would-be friend; and perhaps as well, because Lyons had convinced him how lucrative simply trading in ephedrine might be. (See and compare, *Jacobsen v. United States, supra*, where Government agents induced the defendant's proclivity to commit the offense.)

Under such circumstances it was error to deny the instruction. However weak or unlikely to prevail the Government may claim this evidence was, it was Petitioner's only defense, and was sufficiently supported to go to the jury for determination.

To hold otherwise is to state that the uncorroborated testimony of an informant, who is a drug trafficker and user, and convicted felon, who was under enormous pressure to make a large deal occur, who had pending charges which exposed him to a possible life sentence, and who approached a friend to induce such transaction, is so persuasive on the issue of predisposition, that no rational jury could find a reasonable doubt on that issue.

To the contrary, a rational jury always has the power to disbelieve such informants. The jury in this case was simply not given the chance.

As the error removed Petitioner's only defense from consideration, it was clearly prejudicial.

2. THE TRIAL COURT ERRED IN SENTENCING PETITIONER

The Presentence Investigative Report in this matter had recommended upward adjustments for criminal history and for managerial or supervisorial role. The District Court did not appear to utilize these as a basis; and while Petitioner objected to these as bases (and still does) on the grounds that satisfactory proof had not been supplied for the prior (misdemeanor) convictions (see *United States v. Newman*, 912 F.2d 1119, 1122 (9th Cir. 1990)), and because inadequate proof of supervisorial role had been shown (*United States v. Nevarez*, 954 F.2d 1375 (7th Cir. 1992)), these issues are not addressed in detail, because the District Court did not rely on them and made no findings thereon.

The trial court found, however, a level 42 based on conversion ratio on the ephedrine that was delivered to Petitioner's cohorts as part of the trade. In essence, the District Court assumed that it would produce 83 kilos of methamphetamine, when only 4.5 kilograms of actual methamphetamine was involved in the case.

This conversion was too unreliable and too unsubstantiated to support the base level of 42. The evidence at trial suggested that Petitioner did not have the means or skill to manufacture methamphetamine, and was in essence, brokering ephedrine sales. (R.T. 152-158) He did not even have sufficient funds to purchase the 275 pounds of ephedrine. (R.T. 196)

Such evidence is simply not substantial enough to support a level 42.

First, the Guidelines provides its own offense levels for possession of ephedrine. Pursuant to §2D1.11(d), the offense level for more than twenty kilos of ephedrine is level 28. The application of this section applies where the defendant is aware that the ephedrine (possessed, distributed, exported, or conspired for) is to be used in the unlawful manufacture of methamphetamine.

Section 2D1.11 would seem to be the more specific section, and therefore controlling. (See also, 21 U.S.C. §841(d)(1),(2),(g)(1)).

It is true, pursuant to §2D1.11(c)(1), one must use §2D1.1, where the offense involved unlawfully manufacturing or attempting to manufacture a controlled substance.

But as to the 275 pounds of ephedrine, several factors mitigate strongly against such an application. First, the 275 pounds as to the charged conspiracy, was to be the payment (trade) for methamphetamine and cash. The 275 pounds of ephedrine was not converted into methamphetamine.

In either case, it is inappropriate to attribute the ephedrine to Gamboa as finished product, since there is no substantial evidence that he would have been involved in its manufacture beyond any activity encompassed in §2D1.11. This is particularly so, since there is no evidence that Gamboa (or anyone) was in possession of any of the other essential ingredients to produce methamphetamine.

Thus, a proper attribution of methamphetamine quantity as to Gamboa is the 4.5 kilograms seized, and a base level of 34.

CONCLUSION

WHEREFORE, it is respectfully submitted that the review should be granted, and the judgment reversed.

Dated: August 9, 1994

Respectfully submitted,

MICHAEL IAN GAREY
Attorney for Petitioner
Manuel Guerra Gamboa

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MANUEL GUERRA CAMBOA, Defendant-Appellant.	No. 93-50337 D.C. No. CR-92-1204-01-LCN **MEMORANDUM*** (Filed April 11, 1994)

Appeal from the United States District Court
for the Southern District of California
Leland C. Nielsen, Senior District Judge, Presiding

Submitted April 7, 1994**
Pasadena, California

Before: HALL, LEAVY, and FERNANDEZ, Circuit Judges.

Manuel Guerra Gamboa appeals his conviction for distribution of methamphetamine, possession of methamphetamine with intent to distribute, and conspiracy to

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* This disposition is not appropraite for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously agrees that this case is appropriate for submission without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

manufacture and distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Gamboa also appeals his sentence. We affirm.

I

Gamboa claims that the district court erroneously refused to give his entrapment instruction. "A defense of entrapment is established if the defendant was (1) induced to commit the crime by a government agent and (2) not otherwise predisposed to commit the crime." *United States v. Kessee*, 992 F.2d 1001, 1003 (9th Cir. 1993). "A defendant must present evidence on both elements of the defense, but only '*slight* evidence is needed to create a factual issue and get the defense to the jury.' " *United States v. Sotelo-Murillo*, 887 F.2d 176, 179 (9th Cir. 1989) (citations omitted).

The standard of review for a district court's refusal to give a requested jury instruction is subject to conflicting precedent in this circuit, with some cases applying the abuse of discretion standard and others applying de novo review. *United States v. Sitton*, 968 F.2d 947, 959 (9th Cir.), *cert. denied*, 113 S. Ct. 478 (1992). We need not resolve the conflict because applying either standard, we conclude that Gamboa was not entitled to an entrapment instruction.

Gamboa argues the entrapment instruction was warranted because the government relied in large part on the testimony of an informant whose credibility Gamboa challenged extensively at trial. Gamboa maintains that because the jury could conclude the informant was lying

they could also imagine that the circumstances surrounding the transaction included efforts by the informant to overcome Gamboa's will through repeated references to their friendship. *See United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991) (inducement includes "repeated and persistent solicitation" or "persuasion" which overcomes the defendant's reluctance).

We do not find that a challenge to a witness's credibility constitutes evidence on either inducement or predisposition, particularly in this case. The government did not rely solely on the uncorroborated testimony of a single witness. The government presented numerous tapes of conversations between the informant and Gamboa. During these conversations Gamboa demonstrated an extensive knowledge of the drug industry. For example, he used code words for narcotics, expressed his opinion that one type of ephedrine, German No. 5, was inferior to another, China White, and referred to people "cooking" in the hills.

Furthermore, even if the informant approached Gamboa regarding the transactions underlying his conviction, that does not alter our conclusion. "[T]he entrapment defense is of little use [where an agent deployed to stop the traffic in illegal drugs offers the opportunity to buy or sell drugs and the offer is accepted] because the ready commission of the criminal act amply demonstrates the defendant's predisposition." *Jacobson v. United States*, 112 S. Ct. 1535, 1541 (1992). There was no evidence at trial that Gamboa balked in the least at the informant's offers, much less to the degree necessary for us to conclude that Gamboa created an issue for the jury on the question of predisposition or inducement. Accordingly, the district

court did not err in refusing to instruct the jury on the defense of entrapment.

II

Gamboa contends that the district court erred in calculating his base offense level. The district court converted the five barrels of ephedrine purchased by Gamboa to its methamphetamine equivalent. Using this figure, the district court consulted the Drug Quantity Table of § 2D1.1 to arrive at Gamboa's base offense level. Gamboa argues that the district court erred in assuming that he intended to use all of the ephedrine to manufacture methamphetamine because it was not clear that he had either the means or the skill to manufacture any methamphetamine.

Section "2D1.1 covers a conspiracy to manufacture methamphetamine with intent to distribute." *United States v. Myers*, 993 F.2d 713, 716 (9th Cir. 1993). "Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance." U.S.S.G. § 2D1.1, comment. (n.12); *see also United States v. Bertrand*, 926 F.2d 838, 846 (9th Cir. 1991) (sentencing court may calculate "potential" methamphetamine based on available ephedrine).

Gamboa contends that the district court erred in basing the amount of finished drugs for sentencing purposes on the quantity of one precursor chemical in his possession. Gamboa relies primarily on *United States v. Perrone*, 936 F.2d 1403, 1417 (2d Cir. 1991). In that case, however, the defendant was not convicted of conspiracy

to manufacture methamphetamine but of possession of a listed chemical with intent, knowledge or reasonable cause to believe that the chemical will be used to manufacture cocaine. The Second Circuit concluded that in such circumstances it is reversible error for the sentencing court not to make findings with regard to what the defendant actually knew, understood or reasonably could have foreseen as to the amount of drugs the chemicals could create. *Perrone*, 936 F.2d at 1417. Moreover, that court stated that it was "not holding that a court can never reach a reliable estimate as to quantity on the basis of some drug ingredients if other ingredients are missing." *Id.* at 1419. Thus, neither seizure of a working laboratory nor possession of each precursor chemical required to produce the narcotic is a prerequisite to basing a defendant's sentence on the "potential" narcotic obtainable from a precursor chemical. *See Bertrand*, 926 F.2d at 846-47 (approving conversion when laboratory is dismantled and one precursor chemical was not present). Rather, the inquiry is a factual one.

In this appeal, we find that the government carried its burden of proof as to Gamboa's intent and ability to use all of the ephedrine to manufacture methamphetamine. *See United States v. Harrison-Philpot*, 978 F.2d 1520, 1522 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2392 (1993) (government has burden of establishing quantity of drugs under § 2D1.1 by preponderance of evidence). Gamboa was convicted of conspiracy to manufacture methamphetamine. The government presented evidence that (1) Gamboa talked about people in the "hills cooking," indicating his involvement in a drug manufacturing operation; (2) Gamboa tested the ephedrine by burning it

on tinfoil, a technique utilized by those experienced in the drug business; (3) Gamboa had access to large quantities of methamphetamine, producing over thirty pounds of the narcotic, an amount even his attorney admitted was substantial; and (4) Gamboa initially expressed an interest in purchasing three times the amount of ephedrine upon which his sentence was ultimately based. Given these facts, we cannot conclude the district court committed clear error. *See Bertrand,* 926 F.2d at 846 (review capability of a drug operation for clear error).

The decisions of the district court are **AFFIRMED.**